Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Treaty Three Police Service,

applicant,

and

Public Service Alliance of Canada,

certified bargaining agent.

Board File: 29764-C
Neutral Citation: 2013 CIRB 677
March 5, 2013

The Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. John Bowman and Robert Monette, Members, has considered the preliminary objection raised by the Public Service Alliance of Canada (the PSAC or the union) to the timeliness of the above-cited application for reconsideration filed by the Treaty Three Police Service (T3PS or the employer).

Parties' Representatives of Record

Mr. Ian B. Johnstone, counsel for Treaty Three Police Service;
Mr. Andrew J. Raven, counsel for the Public Service Alliance of Canada.

I–Background

[1] On January 11, 2013, the T3PS filed an application for reconsideration of a Board order that certified the PSAC as bargaining agent for a unit of T3PS employees. The employer alleges that the Board had no jurisdiction to issue the certification order, as its activities fall within provincial jurisdiction for labour relations purposes. The employer relies for this proposition on the

decisions of the Supreme Court of Canada in *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45 (NIL/TU,O); and *Communications, Energy and Paperworkers Union of Canada* v. *Native Child and Family Services of Toronto*, 2010 SCC 46 (Native Child).

[2] The union has raised a preliminary objection to the timeliness of the application. It relies on section 45(2) of the *Canada Industrial Relations Board Regulations, 2012* (the *2012 Regulations*), which requires that applications for reconsideration of a Board order be filed within 30 days of the date on which the order was issued. The PSAC was first certified to represent the T3PS bargaining unit in July 2007, when it displaced the Canadian First Nations Police Association (CFNPA; Board order no. 9303-U). That order was superceded in February 2009 by an order issued on consent of the parties to exclude the position of staff sergeant from the bargaining unit (Board order no. 9603-U). The union further argues that the NIL/TU,O and Native Child decisions on which the employer is relying were issued on November 4, 2010, more than two years prior to the date of the employer's reconsideration application. It argues that the employer has offered no reasonable explanation for its delay in contesting the Board's jurisdiction over its activities.

[3] The employer admits that its application was filed well beyond the time limit established in the *2012 Regulations*, but requests that the Board exempt it from complying with this procedural rule, as permitted by section 46 of the *2012 Regulations*:

> 46. The Board may vary or exempt a person from complying with any rule of procedure under these Regulations–including any time limits imposed under them or any requirement relating to the expedited process–where the variation or exemption is necessary to ensure the proper administration of the *Code*.

[4] The T3PS submits that its application raises important constitutional law issues that warrant review by the Board. It suggests that an order made in excess of the Board's jurisdiction does not somehow become within the Board's jurisdiction simply because the employer did not raise the constitutional issue within the procedural time limits.

II–Analysis and Decision

[5] Section 18 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) provides:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[6] The effect of this provision is that the Board does not become *functus officio* after it renders a decision or order, but can review, rescind, amend, alter or vary those decisions and orders at any time.

[7] The Board uses its powers under section 18 of the *Code* for a number of purposes. For example, it may review and amend a certification order to add or delete positions from the scope of a bargaining unit. It may also use this power to reconcile the interpretation of the *Code* when there are conflicting lines of authority resulting from Board decisions. However, in applying section 18 of the *Code*, the Board is mindful of the statutory provision that indicates its decisions are intended to be final (see section 22 of the *Code*).

[8] Despite the provisions of section 22, parties dissatisfied with a Board decision or order occasionally endeavour to persuade the Board to exercise its section 18 review power to overturn a previous decision. In an effort to promote certainty and finality regarding its decisions and thus labour relations stability, the Board enacted a regulation in 1992 (section 37 of the *Canada Labour Relations Board Regulations, 1992*) that codified the Board's then existing practice. Essentially, the Board created a category or subset of decisions and orders for which "reconsideration" could be sought only within a specified time period, namely 21 days from the date that the order or the reasons for a decision were issued. Initially, the types of decisions and orders that were subject to this time limited opportunity for reconsideration consisted of those that were alleged to be erroneous in law or contrary to the policies of the Board. In its jurisprudence, the Board indicated that exceptional circumstances would be required to obtain an extension of the 21-day time limit.

[9] Section 37 of the 1992 regulations was amended with the adoption of the *Canada Industrial Relations Board Regulations, 2001*, and was renumbered as section 44. Although the time limit for a reconsideration application remained 21 days, the circumstances in which the Board was prepared to reconsider one of its decisions or orders were expanded to include:

> (a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
>
> (b) any error of law or policy that casts serious doubt on the interpretation of the Code by the Board;
>
> (c) a failure of the Board to respect a principle of natural justice; and
>
> (d) a decision made by a Registrar under section 3 of the *Regulations*.

[10] Requests for the review of a Board order for the purpose of clarifying or amending the scope of a bargaining unit were not subject to the time limit established by regulation.

[11] In 2002, the Standing Joint Committee for the Scrutiny of Regulations (the Committee) questioned the purpose of section 44 of the 2001 regulations. In particular, the Committee was concerned that this regulatory provision could fetter the broad discretion given to the Board under section 18 of the *Code*. Ultimately, the Board agreed with the Committee and section 44 was revoked in 2012 with the coming into force of the *2012 Regulations*. While the Board retains the power to reconsider any of its decisions or orders, the grounds for such applications are clearly not limited to those contained in the former section 44. At the same time, the Board extended the time period in which a reconsideration application can be made to 30 days, to be consistent with the time limit for the filing of a judicial review application under the *Federal Courts Act*.

[12] Through its jurisprudence, the Board will determine whether there are additional grounds for reconsideration that should be subject to the 30-day time limit set out in section 45(2) of the *2012 Regulations*. This is the first opportunity since the coming into force of the *2012 Regulations* that the Board has had to consider whether an application brought under section 18 of the *Code* based on constitutional jurisdictional grounds should be subject to the time limit set out in section 45(2) of those regulations.

[13] Board jurisprudence suggests that even jurisdictional claims were formerly considered to be subject to the section 45(2) time limit, but that the time limit would routinely be waived in such cases (see, for example, *TurnAround Couriers Inc.*, 2010 CIRB 544; and *Oneida of the Thames EMS*, 2011 CIRB 564). However, other recent decisions of the Board suggest that the time limit does not apply when decisions of the Supreme Court of Canada remove a jurisdiction that the Board had otherwise exercised for decades (*Dilico Anishinabek Family Care*, 2012 CIRB 655).

[14] As the Board stated in *Dilico*, *supra*, the Board either has constitutional jurisdiction over the parties' labour relations or it does not. If it does not have such constitutional jurisdiction, then its decision is void *ab initio*. When a constitutional decision involving labour relations is issued by the Supreme Court of Canada, the jurisdictional status of certain parties, even if longstanding and previously uncontested, may be affected. Although the Board would prefer that parties seeking to argue that a newly issued Supreme Court of Canada decision affects their constitutional status would do so expeditiously, it cannot rely on a procedural time limit established by regulation to prevent a challenge to the Board's jurisdiction. As the Board noted in *Oneida of the Thames EMS*, *supra*, neither a Board regulation nor policy can clothe the Board with a constitutional jurisdiction that it does not have, or protect an order issued without jurisdiction from review.

[15] Accordingly, the Board finds that the 30-day time limit set out in section 45(2) of the *2012 Regulations* does not apply to applications for review that are based on alleged changes to constitutional jurisdiction as a result of a decision of the Supreme Court of Canada. Like applications for review of the scope of a bargaining unit, such applications may be brought at any time.

[16] Accordingly, the Board finds that the section 18 application filed by the T3PS is timely and directs the Board staff to schedule a Case Management Teleconference with the parties.

[17] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

John Bowman
Member

Robert Monette
Member